I know as well as any social worker that the deplorable homes in our urban centers are breeding and multiplying indolence, illegitimacy, disrespect for law. I know, too, that the collection of relief checks is becoming one of the big occupations in this country. I believe strongly that a moral atmosphere in the home should be a factor in determining eligibility for welfare. An immoral home should not be subsidized.

I grew up in Oklahoma and earned my first money from prizes for my 4-H vegetable garden. Earning this money was enormously important to me. My mother and father always worked harder than they had to, and they taught me the value of work. To this day, my mother, who is 81, works in her garden. And when I go home to visit, she still repeats to me—although I am now 46—the same maxim she spoke over and over to me as a child.

"Juanita," she says, "make yourself useful."

I want no more and no less for every American than the fulfillment of my mother's advice to "make yourself useful." If we have lost certain parents in this generation because of the dependency bred of our welfare programs, let us not also rob so many of our youngsters of this heritage, this privilege—this right to usefulness.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The Chief Clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

TRIBUTE TO MRS. HARVEY FLETCHER, AMERICAN MOTHER OF THE YEAR

Mr. MOSS. Mr. President, it is a pleasure today to make a part of the CONGRESSIONAL RECORD a note of the fine achievements of a Utahan who has gained national recognition.

I speak of Mrs. Lorena Chipman Fletcher, the wife of Dr. Harvey Fletcher, a distinguished scientist and educator at Brigham Young University in Utah.

Mrs. Fletcher has just been selected as American Mother of the Year during ceremonies in New York City.

She is the second Utah mother to receive this honor.

Mrs. Fletcher has 6 children, and 26 grandchildren. All of her sons and daughters have distinguished themselves. One son, James, is currently president of the University of Utah. In a family distinguished by brilliance and diligence, Ph. D. degrees are the norm for the children of Mrs. Fletcher.

This wonderful lady is representative of the excellent qualities of motherhood which are part of our heritage in Utah, a heritage which stretches over 100 years when the Mormon pioneers made their trek across the plains and mountains to Utah.

The selection as American Mother of the Year brings deserved recognition of the many fine qualities Mrs. Fletcher has shown during her life.

To quote Mrs. Fletcher's comments on her children yesterday when she remarked about her selection for this honor:

They are really the ones who brought this honor to me.

Mrs. Fletcher is modest. Without her training and diligence and love as a mother, her children might not have achieved the honors gained by each in his own right.

I congratulate Mrs. Fletcher on her achievement.

POLISH CONSTITUTION DAY

Mr. BAYH. Mr. President, it is appropriate that we pay attention to the observance of Polish Constitution Day.

On May 3, 1791, the people of Poland adopted a constitution which in some ways resembled our own. Unfortunately, there was no opportunity to put this 1791 constitution to an adequate test. By 1795 Poland had been conquered and partitioned and her government had been destroyed.

The Polish people deserve great credit for pioneering efforts to establish responsible constitutional government. This experiment, although not long-lasting, helped show the way for other freedom-loving peoples.

A fundamental concept inherent in the Polish Constitution was the sovereignty of the people. This was stated as follows in a significant passage:

All power in civil society should be derived from the will of the people, its end and object being the preservation and integrity of the state, the civil liberty and the good order of society, on an equal scale and on a lasting foundation.

Although Poland has not yet achieved its full measure of freedom, it is well known that the Polish people remain firm in their aspirations for liberty and justice. Certainly one day these hopes will be realized.

THE WIRETAPPING PROBLEM TODAY

Mr. LONG of Missouri. Mr. President, I ask unanimous consent to have printed at this point in the RECORD a remarkably good new article, entitled "The Wiretapping Problem Today," by an eminent law professor at Buffalo School of Law. The author is Herman Schwartz, formerly assistant counsel on Estes Kefauver's Antitrust and Monopoly Subcommittee. The article which is very current was written for the American Civil Liberties Union and contains a wealth of factual information. It should be of considerable interest to the Senate.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THE WIRETAPPING PROBLEM TODAY

(NOTE.—This report, originally approved by the board of directors of the American Civil Liberties Union on May 1, 1961, was prepared by Herman Schwartz, associate professor of law, State University of New York at Buffalo, School of Law. The 1965 revisions relate primarily to factual updating.)

Wiretapping and other forms of electronic eavesdropping are recognized by even their most zealous advocates as encroachments on the citizen's right of privacy, aptly characterized by Justice Louis D. Brandeis as "the most comprehensive of rights and the right most valued by civilized men."

Recently, pressure to authorize such encroachments has intensified.[1] This is partly in reaction to legislative and judicial efforts to curtail wiretapping and other forms of unlawful and unconstitutional police practices, partly because of a serious and apparently growing crime problem, and partly because modern technology has made these types of surveillance both more penetrating and less expensive. The problem is often posed as one of the perennial dilemmas facing our country today: how can one fight organized crime without unnecessarily invading the citizen's privacy? Put this way, the problem seems resolvable only by some type of "compromise" "balanced" solution, such as that currently being supported by a few articulate prosecutors: A limited amount of wiretapping restricted to the investigation of a few major crimes, and closely supervised and controlled by the courts in all but national security cases. Such a narrowly restricted invasion of privacy seems a small price to pay for smashing organized crime, especially since, as is often noted, we are dealing primarily with the privacy of criminals.

Unfortunately, this reasonable "compromise" is no compromise at all. Physical and other inherent factors virtually preclude any meaningful limitations; moreover, the invasion of privacy is far greater than first appears. These same factors preclude effective supervision by the courts; indeed, experience has shown that many courts don't even try to exercise any control.

Further, there are indications that the so-called dilemma is more apparent than real and that wiretapping may not be quite as indispensable as often claimed.

The American Civil Liberties therefore believes that the present ban on all wiretapping must not only remain in force but it must be strengthened. The enactment of legislation permitting wiretapping would be a staggering blow to the right of privacy, both symbolically and in practice. Symbolically, because our society will thereby have approved unlimited and unlimitable intrusions by the police into the citizen's personal life, contrary to basic constitutional principles. In practice, because innumerable innocent people will have their privacy invaded by officials, who, as Justice Brandeis said, at their best are "men of zeal, well-meaning but without understanding," and, at their worse, susceptible to graft, corruption, extortion and other improprieties.

I. SOME HISTORICAL BACKGROUND

Anglo-American history reflects a long and persistent conflict between the individual's right to be let alone and the impulse to encroach on that right in order to protect society against its lawbreakers.

In 16th century England, the Stationers' Co. was granted authority to search for and seize seditious libel and writings "contrary to the form of any statute, act or proclamation made or to be made." The Stationers, who were authorized to search anywhere, any time, for seditious matter, used these general warrants on behalf of the state to seek out and destroy Puritan and other dissenting literature. Subsequent

[1] In the 1961 congressional session, four separate bills authorizing wiretapping and electronic eavesdropping were introduced in the Senate: S. 1495, S. 1086, S. 1822, S. 1221, 87th Cong., 1st Sess. S. 1086 was reported out favorably by the Subcommittee on Constitutional Rights, with certain amendments, but died there. In the 1962 congressional session, an Administration-backed bill, S. 2813, was introduced, and in 1963, was reintroduced as S. 1308, 88th Cong., 1st Sess. In February 1965, the Senate Government Operations Committee called for legislation to authorize wiretapping, in its Report on the "Valachi Hearings" and the Cosa Nostra.

regimes in 16th, 17th and 18th century England reaffirmed these powers for their own purposes until the 1760's, when such powers were held unlawful.

While these practices were being curbed in England, Parliament granted colonial revenue officers complete discretion to search in suspected places for smuggled goods by means of writs of assistance. The struggle against these writs was described by John Adams as "the first act of opposition to the arbitrary claims of Great Britain." Revulsion against general warrants and writs of assistance led the Founding Fathers to include in the fourth amendment to the Constitution this express ban on general warrants: "no warrants shall issue, but upon probable cause * * * and particularly describing the place to be searched and the person or things to be seized."

The Supreme Court has refined this and has developed the corollary doctrine that a search can be made only to obtain certain objects: tools of crime, fruits of crime, contraband or goods on which an excise duty should have been paid. In other words, the Court has refused to allow police officers to search a person's home merely to obtain evidence of crime. For example, in a murder case, a policeman may obtain a search warrant to search for and seize the murder weapon but not the victim's bloodstained shirt.[3]

Tapping of telephone communications appeared shortly after the telephone's invention. Police officers were reported to be wiretapping as early as 1895. The practice flourished during prohibition and in 1928 produced the most important Supreme Court decision in the area, *Olmstead* v. *United States*.[3] In that case, over the vigorous dissents of Justices Brandeis and Holmes, and by a 5-to-4 vote, the Supreme Court held that telephone conversations were not protected by the fourth amendment against wiretapping because a tap was neither a physical trespass into the home nor a seizure of tangible materials.

In 1934, Congress passed the Federal Communications Act, section 605 of which prohibited the interception of any communication, and the divulgence or use of such communication. This was construed by the Supreme Court in 1937 to prohibit wiretapping [4] and to exclude from Federal trials any evidence obtained through the use of a wiretap, either directly or indirectly.[5] A subsequent decision established that the prohibition applied to intrastate as well as to interstate telephone communications.[6]

In 1942, however, the Supreme Court began to show a more permissive attitude toward wiretapping and other forms of electronic eavesdropping. It first ruled that a defendant could not object to the use of wiretap evidence by the Government, unless he was a party to the conversation,[7] and then, that a detectaphone placed against a wall in an adjoining room to hear one side of a telephone conversation was not covered by section 605.[8] Justices Frankfurter, Stone and Murphy dissented in each case, stating a willingness to overrule the *Olmstead* decision. In 1952 the Supreme Court, in *Schwartz* v. *Texas*,[9] further held that State courts could consider wiretap evidence obtained by State officials even though such wiretapping was illegal. This decision was based upon an analogy with the then controlling decision of *Wolf* v. *Colorado* [10] which held that State courts could consider evidence seized by State officials even though such seizure was unconstitutional. And in *Rathbun* v. *United States* [11] the Supreme Court further declared that permission to eavesdrop by one party to a telephone conversation was sufficient to legalize a detective's listening in on an extension phone.

Even before the Supreme Court's more permissive attitude the U.S. Department of Justice served notice that it would tap. Originally, in the late twenties and thirties, U.S. Attorneys General, FBI Director J. Edgar Hoover, and other Federal officers stated that they disapproved of wiretapping and did none.[12] However, in 1941, under wartime pressure the Department of Justice declared that wiretapping itself was not illegal under section 605 so long as there was no divulgence of the information so obtained. The Department then construed transmission of wiretap evidence by a Federal law enforcement officer to his superior as not a divulgence.[13] This interpretation ignored the express prohibition in section 605 of any "use" of the information so obtained.

The Department's position and the Supreme Court's rulings have resulted in a complete nullification of the prohibitions of section 605, at least insofar as wiretapping by law enforcement officials is concerned. Many State and local officials have continued to tap to this day, with complete impunity. Indeed, despite the clear prohibition of section 605, New York and other States have enacted statutes purporting to authorize law enforcement wiretapping and the use of the evidence so obtained.

In 1957, however, a Supreme Court decision struck a blow at State wiretapping. In *Benanti* v. *United States*,[14] the Court flatly stated that State legislation permitting wiretapping was in conflict with section 605.[15] New York City prosecutors such as Edward S. Silver, of Kings County, and Frank S. Hogan, of New York County, responded with vigorous complaints that their entire operations would be crippled if section 605 were enforced against them. These complaints grew louder after a concurring opinion in a decision of the U.S. Court of Appeals in New York called upon the U.S. attorney to indict and prosecute any use of wiretap evidence by State law enforcement officers.[16]

In June, 1961, the Supreme Court overruled *Wolf* v. *Colorado*,[17] the decision relied upon in *Schwartz* v. *Texas*, and held that State courts could not admit evidence obtained by an illegal search and seizure. This decision has raised hopes that the Court will similarly prohibit State courts from admitting illegally obtained wiretap evidence.[18] So far, such hopes have not been realized.

During the last 25 years many Federal and State legislative hearings have been held in an attempt to resolve the problems. Although State legislative committees in California and New Jersey have concluded that there is no need for any wiretapping authority, steady pressures have been exerted by District Attorneys Hogan, Silver, and O'Connor, of New York, Chief of Police Parker, of Los Angeles, and others, for such authority. In hearings held in May 1961, before the U.S. Senate Subcommittee on Constitutional Rights [19] the Department of Justice also supported legislation authorizing both Federal and State wiretapping, and in January 1962, proposed a comprehensive bill authorizing both Federal and State wiretapping in certain circumstances.[20] Hearings on this bill were held in 1962,[21] and the bill was reintroduced in 1963. Three other bills have also been introduced. The pressures now are so great that despite many prior unsuccessful attempts to persuade Congress to adopt such legislation, the current drive may be successful.[22]

II. THE THREAT TO LIBERTY FROM WIRETAPPING AND OTHER ELECTRONIC EAVESDROPPING DEVICES

An essential difference between the totalitarian state and the free society is that the totalitarian state seeks to deprive the citizen of his privacy by trying to observe all his movements, words, and even thoughts. Fear and insecurity permeate every aspect of life and the pursuit of happiness is merely a phrase.

Recognizing this, as Mr. Justice Brandeis has said: "The makers of our Constitution sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of the rights of man and the right most valued by civilized men." [23]

And in 1894, the first Mr. Justice Harlan declared: "We said in *Boyd* v. *United States* (116 U.S. 616, 630)—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *Re Pacific R. Commission* (32 Fed. Rep. 241, 250), 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' " [24]

Privacy does not, however, mean solitude. Each man must communicate and exchange

[3] The reasoning underlying this distinction will be explained later in the report.

[3] 277 U.S. 438 (1928).

[4] *Nardone* v. *United States*, 302 U.S. 379 (1937).

[5] *Nardone* v. *United States*, 308 U.S. 338 (1939).

[6] *Weiss* v. *United States*, 308 U.S. 321 (1939).

[7] *Goldstein* v. *United States*, 316 U.S. 114 (1942).

[8] *Goldman* v. *United States*, 316 U.S. 129 (1942).

[9] 344 U.S. 199 (1952)

[10] 338 U.S. 25 (1949).

[11] 355 U.S. 107 (1957).

[12] See Westin, "The Wiretapping Problem," 52 Columbia Law Review 165, 173–74 (1952).

[13] See Dash, Schwartz and Knowlton, "The Eavesdroppers," 394 (1959) (hereinafter cited as "The Eavesdroppers").

[14] 355 U.S. 96 (1957).

[15] 355 U.S. at 105.

[16] *Pugach* v. *Dollinger*, 277 F. 2d 739, 746 (1960), *aff'd*, 365 U.S. 458 (1961).

[17] See *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[18] See Note, 75 Harvard Law Review 80, 167 (1961).

[19] Subcommittee on Constitutional Rights of the Senate Judiciary Committee. This was the last set of hearings conducted by this committee which began its inquiry in May, 1958. The subcommittee hearings prior to 1961 are cited as "Hearings," the May, 1961 hearings are cited as "1961 Hearings."

[20] S. 2813, 87th Cong., 2d sess. (1962).

[21] Hearings on Wiretapping—The Attorney General's program before the Senate Judiciary Committee, 87th Cong., 2d sess., cited as "1962 hearings."

[22] As part of this pressure, New York District Attorney Hogan recently found it necessary to dismiss an indictment against seven narcotics peddlers on the ground that the U.S. Court of Appeals in New York had held that it was a Federal crime to introduce wiretapping evidence, New York Times, Nov. 15, 1961, even though this has been common knowledge for many, many years. This tactic was timed to coincide with consideration of S. 1086 by the United States Senate Judiciary Committee, and "was designed to increase the pressure for congressional action." New York Times, December 18, 1961.

[23] *Olmsted* v. *United States*, 277 U.S. at 478.

[24] *I.C.C.* v. *Brimson*, 154 U.S. 447, 479.

thoughts and ideas with others—his wife, his children, his doctor, his lawyer, his religious adviser, his business acquaintances and associates, his friends, his constituents. Often this must be confidential. The growth and complexity of modern society have made the telephone probably the major instrument for such intercourse, for it provides instantaneous, direct, spontaneous, and ostensibly private communication.

To permit law enforcement authorities to wiretap, even under limited circumstances, would seriously impair this privacy so necessary to a free society. Awareness by the public of the power to wiretap is alone sufficient to reduce drastically the sense of security and privacy so vital to a democratic society. The mere thought that someone may be eavesdropping on a conversation with one's wife or lawyer or business associate will discourage full and open discourse.[25] Indeed, government officials who are in office for a period of time can build up a substantial body of information on other public officials and representatives, which can seriously impair the working of representative democracy.[26]

The rapid and multiple development of other forms of electronic eavesdropping only aggravates the threat of this fundamental invasion of personal liberty. In a recent case, *Silverman* v. *United States*,[27] a spike was inserted into a wall and became a giant microphone picking up all conversations on two floors of a house. The Supreme Court held that this violated the fourth amendment. There are now other eavesdropping devices which can record conversations at great distances or behind closed doors easily and inexpensively. The Supreme Court expressed shock and dismay at the microphone in the bedroom installed by California police in *Irvine* v. *California*.[28] By these devices the most private and intimate utterances, often deliberately confined to one's home, are exposed to the ears of listening police. Inevitably, miniature television and image recording instruments will soon be developed and the omnipresent telescreen of George Orwell's "1984" will be with us.

The ACLU believes that all such types of such electronic eavesdropping violate the fundamental rights protected by the fourth amendment to the Constitution. The founders of our Nation established the protections of the fourth amendment because they had seen their homes subjected to unlimited invasions and searches by the authority of general warrants and writs of assistance; they sought to insure that such unlimited searches and general warrants would never be repeated. Government officials were to be allowed only specific warrants, particularly describing, in the words of the fourth amendment, the "place to be searched" and the "thing to be seized."[29]

Electronic eavesdropping cannot be so limited. Any authorization for such practices would necessarily be general, rather than a specific warrant limited to specific objects and places, for it would necessarily permit a general exploratory search for evidence in aid of prosecution. This is because such devices inevitably pick up all the conversations on the wire tapped or room scrutinized, and nothing can be done about this. Thus, not only is the privacy of the telephone user invaded with respect to those calls relating to the offense for which the tap is installed, but (1) all his other calls are overheard, no matter how irrelevant, intimate, or otherwise priviliged, and thus all persons who respond to his calls have their conversations overheard; (2) all other persons who use his telephone are overheard, whether they be family, business associates, or visitors; and (3) all persons who call him, his family, his business, and those temporarily at his home are overheard.[30]

Any assumption that wiretapping and eavesdropping affect only criminals is thus totally unwarranted. The recently proposed Federal bills and existing State statutes do not limit the eavesdropping even to persons suspected of crime. They permit installation of eavesdropping devices wherever "evidence of crime" in general, or of certain specific crimes, may be obtained, whether it be on the home or business telephone of a witness, or merely an acquaintance of the suspect, witness, or even victim. In testimony on February 5, 1965, before the Illinois Crime Commission, a high New York City police officer showed how widely taps may reach when he referred to "a telephone call to friends of a criminal [which] was intercepted." Such friends may be totally innocent of any wrongdoing, and yet an order may issue for a tap on their line.

And what about the suspect himself? We must always keep in mind that the fundamental principle of American justice is that everyone is presumed innocent until he is actually proven guilty beyond a reasonable doubt. A large proportion of people suspected of crime are not even arrested, much less found guilty, yet their privacy and the privacy of many others will have been flagrantly violated if their wires are tapped.

Wiretapping's broad sweep is most apparent where public telephones are tapped. Of 3,588 telephones tapped in 1953–54 by New York police, 1,617 were public telephones, or almost half.[31] It is inevitable that in these cases only an infinitesimal number of the intercepted calls are made by the suspect or by anyone even remotely connected with him; yet, the privacy of numerous other callers is invaded, many of whom may have resorted to a public telephone precisely in order to obtain a privacy not obtainable at their homes or businesses.

Because of this dragnet quality, wiretapping and other forms of electronic eavesdropping cannot be regulated by controls similar to search warrants; the object to be seized or the premises to be searched simply cannot be limited or even specified, because the very nature of a wiretap or spike microphone is to catch all calls and conversations. Indeed, the proponents of wiretapping themselves admit that the process is indiscriminate, because one of the alleged benefits of wiretapping is that evidence of one crime has occasionally been uncovered when policemen were looking for evidence of another crime.[32] Such claims would explain why the police frequently put a tap on the line of anyone whom they believe to be suspicious.[33] New York State Assemblyman Anthony P. Savarese, a vigorous proponent of authorized law-enforcement wiretapping, made this very clear, saying:

"All they (law-enforcement officers) want to do is to exercise surveillance over his (a known criminal's) phone. That is the whole purpose of law-enforcement tapping. If they know that a certain crime is going to be committed, there is no point in tapping his wire. It is to find out what this known criminal is going to do that you want the surveillance over his phone."[34]

Such surveillance searches and wiretaps are inherently and necessarily general searches, not specific, and they are thus clearly and flagrantly in violation of fourth amendment standards.

That wiretaps are general and not specific searches is also reflected in the very language of statutes to legalize the practice. Existing and proposed statutes permit wiretapping to "obtain evidence of the commission of a crime,"[35] or of specific crimes,[36] without requiring, as does the fourth amendment, specification of "the things to be seized," the particular conversations. Indeed, the Attorney General's bill goes even further, for it permits a tap if "facts concerning (any specified) offense may be obtained through such interception," and the phone intercepted is "commonly used by" the suspect. A public telephone in a frequently visited bar or railroad station, or a private telephone of a friend, one's lawyer or a relative—all satisfy these criteria.

The language of these provisions is, of necessity, the language of a general warrant and no more specifically is possible, for it cannot be determined in advance what conversations will be intercepted. Nor can it be specified what "place (is) to be searched" by citing the specific telephone number, for also intercepted are calls emanating from the telephone numbers of all others who call the intercepted number, a totally indefinable class.

Indeed, most of these statutes do not begin to meet other constitutional standards for a valid search under the fourth amend-

---

[25] Simply being aware of the possibility of electronic eavesdropping destroys one's sense of security. This was ironically demonstrated by the U.S. Attorney's office in Washington, D.C., in 1963, when a hidden microphone was found in a room in the Mayflower Hotel. Shortly thereafter it was reported in the Washington Post that "the U.S. Attorney's office which is investigating the mysterious Mayflower 'bugging' case has had some quiet checks made of its own telephone lines against electronic eavesdropping. * * *. The security drive has spread to almost everyone connected with the Mayflower case. Lawyers and private detectives in the case have had their telephones checked or have checked them personally in search of tapping devices."

[26] For reports of such tapping, see Fairfield and Clift, "The Wiretappers," The Reporter, 19–22 (Dec. 23, 1952), and the recent hearings before the Senate Administrative Practices and Procedures Subcommittee, February 1965.

[27] 365 U.S. 505 (1961).

[28] 347 U.S. 128 (1954).

[29] The ban on general warrants, particularly in cases touching upon the first amendment, was recently reaffirmed in *Stanford* v. *Texas*, — U.S. — (Jan. 18, 1965), whre the Supreme Court unanimously struck down as too general a search warrant authorizing the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas."

[30] "In the course of tapping a single telephone a police agent recorded conversations involving at the other end, the Julliard School of Music, Brooklyn Law School, Consolidated Radio Artists, Western Union, Mercantile National Bank, several restaurants, a drug store, a garage, the Prudential Insurance Co., a health club, the Medical Bureau to Aid Spanish Democracy, dentists, brokers, engineers, and a New York police station." Cited in Westin, "The Wiretapping Problem," 52 Columbia Law Review 165, 188, n. 112 (1952).

The Queens County District Attorney had called for wiretapping authority in criminal abortion cases. 1961 Hearings 327. If such authority were granted, confidential communication between a suspected physician and all of his patients—whether abortion patients or not—would be overheard. Such interceptions have already taken place in New York. See *People* v. *Cohen*, 248 N.Y.S. 2d 339 (Sup. Ct. Kings 1964).

[31] Note, "Wiretapping in New York," 31 New York University Law Review 197, 210, n. 96 (1956).

[32] "The Eavesdroppers," 211, 278.

[33] "The Eavesdroppers," 66.

[34] 1961 hearings 463.

[35] S. 1086, 87th Cong., 2d sess.; N.Y. Code Crim. Proc. sec. 813a.

[36] S. 1308, 88th Cong., 1st sess.

ment. Under a valid search warrant, the police can only search for articles involved in the commission of the crime, fruits of the crime, contraband, or items on which excise duties should have been paid. Such limitations are reflected in the Federal Rules of Criminal Procedure, rule 41(b). The proposed wiretapping statutes, on the other hand, permit a search for and seizure of mere evidentiary matter, pieces of evidence to assist in prosecution and conviction. The Supreme Court has recently held that "private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search that discovers them." [37]

The underlying principle—one of the most fundamental to personal security in a free society—is clear: a person has an absolute right of privacy against any police invasions for all of his papers and effects except in a few special cases: (1) those things he has no to have in the first place, such as fruits of crime of contraband; (2) those where he has not given the community its lawful share of the value (dutiable goods); and (3) those which he has used to break the law and to which he has thereby forfeited his rights. Everything else, no matter how interesting or useful it may be as evidence, is immune to a search warrant.[38]

One of the major pressure points in the current drive for Federal wiretapping legislation is to give States the right to use wiretapping for the detection of crime, a practice which a few States already authorize.

Granting the States the right to use wiretapping for some or all crime is especially unwise. In the first place, telephone communication is frequently interstate; permitting each State to decide for itself whether to authorize its law enforcement officers to wiretap will inevitably result in wiretapping the telephone conversations of people who reside in States where law enforcement officers may not wiretap. Thus, if a Senator or Congressman in the District of Columbia, Illinois, Pennsylvania, California, or Michigan is called by someone or makes a call to someone in New York or Massachusetts, and the latter's telephone is being tapped, the privacy of the Senator or Congressman has been invaded even though he did nothing but answer or place a telephone call, and no matter how irrelevant the conversation to the purpose of the tap.

Moreover, the record is full of abuses of the right to wiretap by State and local officials. Most of the bills authorizing State wiretapping set either no limit or the broadest of limits on the crimes for which a tap may be imposed. Thus, one recent proposal permits State wiretapping for crimes "involving gambling, liquor, narcotics, or prostitution or any crime punishable by a maximum sentence of 5 years or longer." [39] If an unpopular group is suspected of violating one of the many technicalities of a State liquor law at a benefit party, even though such charges turn out to be baseless, a tap may be put on the telephones of that group. And recent experience in the South shows that there are many ancient penal statutes which carry severe penalties and which can be dusted off to obtain wiretapping authority.

It was also reported at the recent Illinois Crime Commission hearings that telephones were tapped during the racial disorders in New York City in the summer of 1964. Since some disorder is possible in every civil rights demonstration, this would seem to indicate that civil rights groups are now a legitimate target of police wiretapping.

The South offers an example of how wiretapping can be utilized to strengthen existing racial segregation. A Federal grand jury in New Orleans, La., has indicted three men, including a Louisiana State senator, for wiretapping the telephones of three religious leaders. These leaders, a Baptist, a Jew and a Quaker, were among some 53 Baton Rouge ministers who had earlier issued an "affirmation of religious principles" that "discrimination on the basis of race is a violation of the divine law of love." Another Baton Rouge minister declared in an anonymous interview that the purpose of the tapping was "to take these recordings to key members of our congregations and stir up trouble against us. The two chief targets were Mackie (Quaker) and Reznikoff (Jewish), in order to stir up all the latent hatred for anti-semitism which you can find in a small minority in any church congregation." The minister added that he had been told flatly that the ultimate purpose of the tappers was "to run out of town every clergyman who signed this document, within the space of the next 2 years." [40]

This alleged wiretapping occurred at about the same time as the formation of a Southern Association of Intelligence Agents, representing police officials of nine southern States. The purpose of this organization is to ferret out "subversion," i.e., integrationist efforts.[41] Legalized wiretapping could become a major weapon in the armory of such groups.

Moreover, the legitimation of wiretapping will inevitably produce an increase in the number of States where wiretapping is used. At present, most States prohibit law enforcement and other wiretapping. Testimony before the Senate Judiciary Committee in 1962 indicated, however, that if the bill passed, wiretapping authority would immediately be sought in other States, such as Pennsylvania, Florida and Connecticut.[42] The reductio ad absurdum was reached when a district attorney from Iowa testified that although there was no real problem of organized crime in his State, wiretapping "would be a valuable tool in Iowa to help us in solving some of the crimes that we have." [43] Nor is there any reason to think that the limitation to specified crimes will be meaningful. The bill introduced by the Attorney General in 1962 would permit the Federal Government to use wiretapping for offenses involving national security—including the Smith Act [44]—murder, kidnapping, extortion, narcotics, bribery, transmission of gambling information or racketeering. It would authorize the States to permit wiretapping for murder, kidnapping, extortion, bribery and narcotics. Whatever one may say about these choices this limitation will inevitably be eroded as pressure builds up to permit wiretapping for other offenses. Such pressure has already begun. At the hearings on the bill in 1962, attempts were made to include counterfeiting, robbery, gambling, abortion, and larceny by fraud. Although indicating a desire to maintain limitations, the Attorney General also showed a willingness to expand the list, saying "I would think that an argument could be made for counterfeiting * * * I think that a strong argument can be made for including robbery and perhaps we should have included it." [45]

Proponents of wiretapping say that abuses can be avoided by State courts applying a court order system. But some State judges cannot be depended on too heavily, especially in areas where the rights of either unpopular minorities or unpopular individuals are concerned. For example, a State officer enforcing a segregation statute would be entitled to a wiretap order for enforcing this law, at least until the law was held unconstitutional. There is also the hard reality that State courts often seem less solicitous of the rights of the individual. Thus, many of the most fundamental Supreme Court opinions in the area of individual liberty have been decisions reversing State courts. Also, some State judges seem less than immune to pressure from prosecutors and their staffs, especially with respect to law enforcement investigatory techniques. Consequently, judge shopping is resorted to and "it is practically unheard of for a judge to fail to grant a wiretap order for the district attorney." [46] New York prosecutory and judicial personnel support this statement. Thus former New York Judge Ferdinand Pecora has stated that although he sometimes refused to grant police department applications in situations where other means were available (which generally involved taps on the wires of individual prostitutes) he never refused an application where gambling was concerned. And, as the evidence below shows, there are many instances of fraud and misrepresentation.

Because of the unlimited and unlimitable invasion of the fundamental rights protected by the fourth amendment, wiretapping and other forms of electronic eavesdropping must be prohibited. Even though a bare majority of the Supreme Court did declare in the *Olmstead* case that the fourth amendment does not directly protect telephone conversations against wiretapping, this decision has been sharply criticized by almost all legal commentators and greatly weakened. Indeed, Senator Kenneth Keating, of New York, sponsor of a bill to exempt from section 605 State wiretapping pursuant to a court order, has declared that his bill reflects the Brandeis dissent in Olmstead.[47]

III. THE ARGUMENTS FOR WIRETAPPING [48]

Prosecutors and police authorities who favor permissive wiretapping assert that in

[37] *Abel* v. *United States*, 362 U.S. 217, 235 (1960); see also cases cited therein; and *United States* v. *Lefkowitz*, 285 U.S. 452, 465–66 (1932). Indeed, the Attorney General's bill would permit wiretapping merely to obtain "facts" of certain national security offenses which is apparently meant to include material which would not be admissible in evidence. See S. 1308, sec. 5(a). See also sec. 8(c)(2) which authorizes a judge to issue an order where he has reason to think "facts concerning [any offense for which wiretapping is permitted under the act] may be obtained through such interception."

[38] The Supreme Court has not yet dealt with the question whether this restrictions will be imposed on State law enforcement officers under *Ker* v. *California*, 374 U.S. 23 (1963). Compare the 1962 amendments to the New York Code of Criminal Procedure sec. 792(4) which permits a search for and seizure of "property constituting evidence of crime or tending to show that a particular person committed a crime." A recent lower court decision in New York, however, held that a State cannot constitutionally authorize electronic eavesdropping because such eavesdropping inevitably intercepts merely evidentiary matter. *People* v. *Grossman*, N.Y. Law J. (Kings Co.) Mar. 2, 1965, pp. 17–18 (Sobel J.).

[39] S. 1086, 87th Cong., 1st sess. (1961), as reported by the Senate Subcommittee on Constitutional Rights.

[40] Baton Rouge State-Times, Oct. 23, 1961. See also Washington Post & Times Herald, Oct. 10, 1961.

[41] See New York Times, Nov. 27, 1961.

[42] 1961 hearings 211, 217, 258.

[43] Id. at 265.

[44] The dangers to freedom of speech have been pointed out frequently. See e.g., Donnelly, "Electronic Eavesdropping," 38 Notre Dame Lawyer 667, 686 (1963).

[45] 1962 hearings at 22, 23.

[46] "The Eavesdroppers," 45; of his experience as a New York assistant district attorney former U.S. Attorney General William P. Rogers said, "I don't recall any difficulty in getting the permission of the court. My own experience is that it's pretty easy." Hearings on H.R. 408 before Subcommittee No. 3 of the House Committee on the Judiciary, 83d Cong., 1st sess., ser. 7 at 37 (1953). See also Sobel, "Current Problems in the Law of Search and Seizure," 111 (1964).

[47] 1961 hearings 13.

[48] Few arguments have been seriously presented for the use of any other electronic eavesdropping devices. But see sec. IV infra.

fact they do very little tapping and that it is indispensable where used. Neither of these contentions is supported by the record.

The extent of wiretapping

The statistics published by the district attorneys of New York and Kings Counties show an average of about 110 orders per year for the period 1950–59, with 21 orders in 1964 in Kings County covering 29 phones. The New York City police obtained 124 orders in 1958, 225 in 1959, 451 in 1963 and 671 in 1964.[49] The enormous increase in police wiretapping is obvious and startling. Thus, at least 335 orders were obtained in New York City in 1959, covering more than 500 telephones, for an order frequently covers more than one telephone.[50] Since one tap catches many, many people per day, especially taps on business and public telephones, and perhaps 45 to 50 percent of the telephones tapped are public phones[51]—these orders produced an invasion of the privacy of thousands of people every day.

Moreover, there is ample evidence of much unauthorized police wiretapping throughout the country.[52] As New York Assemblyman Savarese's remarks indicate, much of this unauthorized eavesdropping is resorted to as surveillance and sampling tapping, on the basis of which an application for an order can be framed if the tap turns up useful information. Indeed, the very vigor of the claims for the indispensability of wiretapping by New York District Attorneys Hogan, Silver and O'Connor makes it difficult to understand their claims of infrequent use. At one point, District Attorney Hogan called wiretapping "the single most important weapon in the fight against organized crime" and declared that without it "law enforcement in New York is virtually crippled in the area of organized crime." He then submitted a table showing use in only 20 to 22 investigations a year for 10 years, even though his office handled some 34,000 matters a year during this period.[53] It is thus quite easy to understand Congressman EMANUEL CELLER'S trenchant comment: "If you have a method which is so easy * * * I cannot conceive how in ordinary circumstances the police wouldn't avail themselves of that very facile method of detecting crime." [54]

Nor is it likely that the amount of wiretapping or electronic eavesdropping can be significantly reduced or even controlled by a court order system, either State or Federal. With the vast amount of unauthorized official wiretapping that goes on, is it at all likely that any court control which seriously attempts to limit and reduce the amount of wiretapping will be successful? If the police find the limitations chafing, they can ignore them as much as they ignore the present absolute prohibition. The only result would be to make the practice legal and respectable and to sanction the admission of wiretaps in evidence, thereby removing one of the few deterrents to such improper conduct.[55]

Indeed the possibility of getting an order rendering the wiretap evidence admissible will only encourage sample tapping to see whether it is worthwhile to apply for an order.

Finally, the protections contemplated by a preliminary showing that the wiretap will turn up evidence of a crime are futile. As the Attorney General of New Mexico recently stated "these procedures are of necessity ex parte and lend themselves to star chamber tactics. Any time a judge hears only one side of a controversial question he is at a distinct disadvantage in reaching a just decision." [56] Review of such proceedings is a meaningless formality, for it can only be of a cold printed record long after the fact, and few appellate courts will be inclined to overrule the discretion of the lower court judge who issued the order. Moreover, in most instances the tap will turn up nothing useful and no one but the judge and the investigator will know of it. Thus, not only will the application be ex parte, but unlike a search warrant, there will never be an opportunity to review the propriety of the order for in most cases, no adversary interest will know about the tap.

The opportunities for challenge are reduced even further by the fact that very few taps are directly introduced in evidence. In part, this is because in court, the tap can be challenged for veracity and accuracy and much wiretap evidence would prove inadmissible. Instead, taps are used primarily as leads to other evidence and the defendant must try to ferret out whether any of the evidence used against him is derived from wiretapping. According to a Yale Law Journal study some years ago, Federal judges have been very reluctant to permit such an inquiry, and the rule excluding wiretap evidence from the Federal courts has proven an illusory safeguard.[57] There is no reason to think defendants have been more successful in tracing wiretap evidence in State courts.[58] Indeed, conversations with defense attorneys in New York indicate that except where the police or prosecutor voluntarily discloses the existence of a wiretap, it is almost impossible to learn whether a wiretap has been used and to challenge its issuance.

The small probability of a challenge to the propriety of a wiretap order invariably makes for lax judicial scrutiny of the application, especially where judges are overworked or otherwise unable to make a close study of papers. Some judges are, of course, more prosecution-minded than others, and practicing lawyers know that careful judge-shopping is one of the most important and widely practiced skills of any successful law practice. This may be one reason why New York and Queens district attorneys assert that, although they have occasionally been required to modify their supporting papers, they have never been denied a wiretap order.

Nor does experience with a court system provide any basis for faith. Such systems have been in effect in New York and a few other States for several years. One experienced New York judge has observed that the papers in support of the applications frequently contain little more than the "formal matters presented by the Statute;" [59] and there have even been demonstrated instances of false affidavits.[60]

An extensive 2-year study concluded that:

"The experience of the statutes throughout the country providing for judicial supervision has been very bad. Law enforcement officers have had no difficulty obtaining a court order when they wanted it. Judges who are tough are just bypassed.

"In addition, police officers have shown complete impatience with the court order system and more often have engaged in wiretapping without a court order than with a court order." [61]

In sum, the court order system provides far too meager a protection for so great and dangerous an invasion of privacy.

Is there really a need for wiretapping?

Despite the clamor for wiretapping by certain prosecutors no clear case has yet been made for its necessity. In the first place, many prosecutory officials either deny or refuse to assert that wiretapping is so indispensable as to outweigh the danger to personal liberty. In response to inquiries from the Senate Subcommittee on Constitutional Rights only some 13 out of 45 attorneys general called for wiretapping authority. Most of the responses refused to express an opinion (approximately 26) and 6 came out flatly against wiretapping, including the attorney general of such a populous State as California.[62] At other hearings the attorney general of Pennsylvania condemned wiretapping and the State's attorney in Cook County, Ill., a State where wiretapping is totally outlawed, declared: "I do not think one can honestly say that wiretapping is a sine qua non of affective law enforcement." [63] Especially significant is the fact that so many State attorneys general did not consider it necessary to call for wiretapping authority, although in some cases at least, this was probably because wiretap evidence is admissible even if illegally obtained.

State legislative investigating committees in New Jersey [64] and California [65] have recently found that the need for wiretapping does not outweigh the damage to individual liberty and judges who have issued wiretap orders, such as New York Justices Samuel Hofstadter and Nathan Sobel and New York Special Sessions Judge Frank Oliver have disparaged its value.[66] Indeed, as shown by the

---

[49] The figures for 1950 through 1959 appear in hearings on the current wiretapping dilemma in New York State created by Federal court decisions, 10–14, 62 (1960). (Hereafter cited as "N.Y. hearings.") The figures for 1963 and 1964 appear in testimony by New York City Assistant Chief Inspector John F. Shanley and Kings County Chief Assistant District Attorney Elliott Golden before the Illinois Crime Commission, on Feb. 5, 1965. The latter's testimony is reprinted in N.Y. Law J. (Mar. 1, 2, 1965).

[50] See statistics for Kings County, N.Y., which show 1.7 telephones per order. N.Y. hearings at 62.

[51] See p. 10, above.

[52] "The Eavesdroppers," 39–73, 122, 151, 168, 217, 247; Fairfield and Clift, "The Wiretappers," the Reporter, Dec. 23, 1952, Jan. 6, 1953; Westin, "Wiretapping: The Quiet Revolution," Commentary, May 1960, 333, 337; Westin, "The Wiretapping Problem," 52 Columbia Law Review, 195–196; cf. Attorney General Kennedy, Look magazine, Mar. 28, 1961, p. 25.

[53] 1961 hearings 437, 440.

[54] Quoted in "The Eavesdroppers," 43.

[55] It is also debatable whether a Federal court can grant wiretap orders, because applications for such orders may not come within the definition of "case or controversy" under article III of the Constitution. Such orders are not merely ex parte, but most will never be tested, because they will not produce useful evidence. Thus as Justice Jackson observed, even the power of a Federal court to attempt to limit wiretapping "raises interesting and dubious" constitutional questions. "The Supreme Court and the American System of Government," 12 (1955).

[56] 1961 hearings 483.

[57] Comment, 61 Yale L. J. 1221 (1952).

[58] Cf. *People* v. *Scardaccione*, 245 N.Y.S. 2d 721 (Sup. Ct. Kgs. 1963); see Sobel, op. cit. supra n. 46 at 112–13.

[59] "Matter of Interception of Telephone Communications," 207 Misc. 69, 136 N.Y.S. 2d 612, 613 (Sup. Ct. N.Y. 1955).

[60] See report of the Kings County Grand Jury, summarized in Westin, 52 Columbia Law Review at 195–96; cf. testimony of Prof. Alan Westin, 1961 hearings 206.

[61] Dash testimony, 1961 hearings 104–05. A recent report by a Bronx County Bar Association committee concluded that search warrants were frequently granted on false affidavits. New York Times, Mar. 10, 1965, p. 51. This is even more likely with wiretap applications because of the low probability that they will be challenged.

[62] 1961 hearings 539–575.

[63] 1961 hearings 400.

[64] Report of New Jersey Joint Legislative Committee to Study Wiretapping and Other Unauthorized Recording of Speech, 27 (November 1958), reprinted in hearings 1783–1834.

[65] Hearings before the Senate Judiciary Committee of California (1956) summarized in "The Eavesdroppers," 192–98.

[66] For Judge Oliver's remarks in 1948, see Westin, 52 Columbia Law Review at 195. For Judge Sobel's views see Sobel, op. cit. supra n. 46 at 109–10.

1961 study and compilation by the Senate Subcommittee on Constitutional Rights, 33 States, including Illinois, Michigan, Pennsylvania, California, Florida and other populous and industrialized jurisdictions have completely outlawed wiretapping and in some instances its fruits. This was done both by statute (Wisconsin, 1961, Pennsylvania and Illinois in 1957) and by judicial decision (California, Florida, and New Jersey, within the last 6 years, and Michigan earlier).

On the Federal level, until recently, there has also been less enthusiasm for wiretapping than might be expected. The Department of Justice has recently proposed legislation authorizing broad Federal and State wiretapping and endorsed a similar bill at the hearings in May 1961. However, in March 1961 Attorney General Robert F. Kennedy declared that he "would not be in favor of its use under any circumstances—even with the court's permission—except in certain capital offenses," which he listed as "murder, treason, and kidnapping." [67] Similarly, although FBI Director J. Edgar Hoover now appears converted to the cause of wiretapping, at various times in the last 30 years, he has called it "unethical," [68] inefficient, and "a handicap to the development of sound investigational techniques." [69] In 1940, he said: "The discredit and suspicion of the law-enforcing branch which arises from the occasional use of wiretapping more than offsets the good which is likely to come of it."

Of late, however, the Department of Justice and recent Attorneys General have asserted that wiretapping is necessary in internal security cases. At first blush, this argument is indeed appealing, for internal security has become so paramount a value in America today that its mere invocation is often enough to silence defenders of all other values. But a free society does not give its police officers enormous powers without requiring a demonstration from them that such powers are necessary. No such showing has yet been made. No evidence has been submitted of a single case where the FBI's illegal wiretapping was indispensable, or where the lack of wiretapping authority significantly hampered operations. Indeed, will sensible espionage agents ever use the telephone? Of course, there have been many statements and representations that the lack of wiretapping authority is a serious hindrance in this area but no demonstration with examples and analysis has yet been made.

We cannot afford to emulate the police states in giving prosecution and police such penetrating and dangerous powers whenever they merely demand it. A free society guards its liberties jealously, and permits restrictions only upon a clear demonstration of urgent necessity.

The results of wiretapping where it has been used extensively, are not conclusive or even impressive. Thus, District Attorney Hogan claims that between 1950 and 1959, he obtained some 727 orders (including renewals) for 219 investigations, which probably covered some 1,250 telephones. These orders, according to Hogan, were involved in some 458 arrests and 335 convictions. Kings County statistics show 275 orders, 362 telephones and some 179 convictions during the period 1950 to 1955. New York City Police Department figures show that in 1954, 1,081 telephones were tapped with 395 arrests; in 1963 there were 451 orders with 221 arrests involving 969 people, and in 1964, 671 orders, and 297 arrests involving 1,022 persons. The police department supplied no figures for 1963 or 1964 relating to the number of telephones tapped or the number of convictions obtained.

It is difficult to assess these statistics without data as to (1) the type and quantity of each of the offenses involved; (2) the indispensability of the wiretap evidence to those convictions that were obtained; and (3) with respect to the police department figures, how many of those arrested were found guilty or even charged with a crime. As to the first, the evidence is rather clear that wiretapping is used most extensively in the "morals" area, vice, and bookmaking.[70] Are convictions in this area worth giving the police such dangerous powers, especially since these are the areas of greatest abuse? [71] In New York, for example, gambling and vice are only misdemeanors. And even in these areas, wiretapping does not seem overly effective, according to judges who have issued wiretap orders. Justice Samuel Hofstadter of New York declared that his record of the fruits of wiretapping orders "showed some arrests and fewer convictions and then rarely, if ever, for a heinous offense," [72] and as noted, New York Special Sessions Judge Frank Oliver made similar observations.

Insofar as gambling and vice are generally operations of organized crime, the problem is not that the investigative techniques are inadequate but that the public is indifferent and law enforcement either inept or corrupt. There is no reason to think that the laws against gambling and vice are better enforced in New York, which permits wiretapping, than in Pennsylvania, which does not. Indeed, a recent study in New York, although calling for wiretapping authority, attributed the ineffectiveness of efforts to suppress organized gambling primarily to the "absence of integrated effort" among law enforcement agencies, as well as to lax police work and public indifference.[73] And the same causes can be seen elsewhere.[74]

Insofar as some of the leaders of organized crime have been brought to justice, this has been more through the efforts of Federal law enforcement agencies who claim they do not wiretap in such cases.

As Mr. Justice Frankfurter said, dissenting in *On Lee* v. *United States*:

"Suppose it be true that through 'dirty business' it is easier for prosecutors and police to bring an occasional criminal to heel. It is most uncritical to assume that unless the Government is allowed to practice 'dirty business' crime would become rampant or would go unpunished.

"In the first place, the social phenomena of crime are imbedded in the texture of our society. Equally deep seated are the causes of all that is sordid and ineffective in the administration of our criminal law. These are outcroppings, certainly in considerable part, of modern industrialism and of the prevalent standards of the community, related to the inadequacy in our day of early American methods and machinery for law enforcement and to the small pursuit of scientific inquiry into the causes and treatment of crime.

"Of course we cannot wait on the slow progress of the sociological sciences in illuminating so much that is still dark. Nor should we relax for a moment vigorous enforcement of the criminal law until society, by its advanced civilized nature, will beget an atmosphere and environment in which crime will shrink to relative insignificance. My deepest feeling against giving legal sanction to such 'dirty business' as the record in this case discloses is that it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training." [75]

Moreover, one cannot overlook the abuses to which the power to wiretap may be subject. Doctoring of tape recordings is not difficult, as has been demonstrated many times. There have also been many instances of extortion and shakedown based on information obtained by wiretapping, especially in the gambling area where wiretapping is most used.[76] A grant jury investigation in Kings County in 1950 unearthed much corruption, including false supporting affidavits in support of the application for a court order, and vague, conclusory pro forma applications in other instances.[77] Other recent examples of police shakedown and corruption in New York City and elsewhere preclude optimism that city police officers will not abuse this weapon.

While any device or weapon can be abused, the secrecy and scope of the tap makes it especially prone to abuse. The tapper who is at all unscrupulous or weak is severely tempted. The problem is aggravated by the absence of any effective check on how the tapper obtains and uses his information. Thus, if he does pick up blackmail material, he can use it without even revealing how he obtained this material, and there is no way of checking. The person blackmailed will generally want to avoid the publicity attending a private suit or a complaint to the authorities.

IV. A NOTE ON ELECTRONIC EAVESDROPPING

Earlier in this study, it was said that legitimation of wiretapping would be a great symbolic blow to the right of privacy. A reason in addition to those set forth above is that it would set a precedent for electronic eavesdropping and thereby justify such devices as concealed or contact microphones which, placed next to a part of a house such as a room or the plumbing or a heating duct, can pick up every word spoken in the entire house. Parabolic microphones exist which can overhear conversations hundreds of feet away. Such devices have been used by police officers. A forthcoming survey by the Association of the Bar of the City of New York depicts even more startling devices, most of which are designed for and bought by Government agencies.

Recent history shows that the legitimation of wiretapping leads to the legitimation of these other devices, as well. Thus, the New York,[78] Nevada,[79] Massachusetts,[80] and Ore-

---

[67] Look magazine, Mar. 28, 1961, p. 25.

[68] Quoted in Westin, 52 Columbia Law Review at 173n. 44.

[69] See Note, 31 New York University Law Review at 213n. 103.

[70] See Note, 31 New York University Law Review at 203 (1956); cf. testimony of Assemblyman Savarese, 1961 hearings 465. See Sobel, op. cit. supra n. 46 at 110.

[71] Prof. Alan F. Westin cited gambling, bookmaking and prostitution as areas "where I think wiretapping is least needed and is the greatest attraction to misuse of wiretapping authority." 1961 hearings 206. See also testimony of Bell Telephone System executive W. Coles Hudgins, 1961 hearings 251.

[72] "Matter of Interception of Telephone Communications," 207 Misc. 69, 136 N.Y.S. 2d 612, 613 (Sup. Ct. N.Y. 1955).

[73] Report on syndicated gambling in New York State, 100–110 (1961).

[74] "The Eavesdroppers," 128 (New Orleans), 280 (Nevada); New York Times, Nov. 29, 1961 (Boston, Mass.).

[75] 343 U.S. 747, 760–61 (1952).

[76] "The Eavesdroppers," 52–62, 219, 280; Westin, "Wiretapping: The Quiet Revolution," Commentary, May 1960, p. 337; Westin testimony, 1961 hearings 206.

[77] See Westin, 52 Columbia Law Review at 95–96; see also remarks of Justice Hofstader, 136 N.Y.S. 2d at 618.

[78] Code Criminal Procedure sec. 813-a, 813-b. As noted at n. 38 supra, these provisions were recently held unconstutional by a lower court in New York City. The decision will undoubtedly be appealed.

[79] Nev. Rev. Stat. 200.660, 200.670 (1959).

[80] Mass. Gen. L. Ann. c. 272, sec. 9 (1959 Supp).

gon[81] statutes, originally limited to wiretapping, now permit eavesdropping of all conversations. In 1961 Senator Kenneth Keating, of New York, introduced a bill to permit States to legalize not only wiretapping, but all other types of electronic eavesdropping.[82] Once such eavesdropping is legitimated, the narrowing enclave of privacy which we presently retain will shrink to the vanishing point.

V. RECOMMENDATIONS

In one respect, those who call for wiretapping legislation are right: the present situation is bad. But this is not because the statute is vague and the prosecutor does not know what he may and may not do. Section 605 flatly bans all wiretapping, and it is clearly unlawful for State judges and prosecutory officials to participate in the commission of a Federal crime by procuring wiretap information and admitting it into evidence. Section 605 should therefore be tightened as follows:

1. All evidence obtained directly or indirectly from a wiretap should be rendered inadmissible in any court, to eliminate the spectacle of a court sworn to uphold the laws of the United States participating in the commission of a Federal crime by aiding and abetting the divulgence of illegally obtained and illegally disclosed evidence.

2. The law should be changed to make it perfectly clear that an offense is committed by either interception or divulgence. The statute does in fact say as much now, but within the Department of Justice and other agencies, it has been interpreted to allow interception so long as the information is not divulged outside the agency.

3. A defendant should be permitted to object to the admission in evidence of wiretap evidence even though he is not a party to the conversation, for any persons adversely affected has the right to protest the commission of a Federal offense by a court.[83]

4. Grand juries should be convened periodically to inquire into the enforcement of the law against wiretapping. Because of the record of unauthorized use of wiretapping, the blackmail temptation and other corruption facilitated by this practice, and the ever-increasing growth of new eavesdropping devices, there must be constant review of the electronic eavesdropping problem.

5. A private remedy for unlawful wiretapping should be statutorily established with minimum punitive damages plus counsel fees. If the possibility of financial loss to the wiretapper exists, unlawful wiretapping can be deterred.

6. The various telephone companies should be required to lock all feeder and terminal boxes and to report all instances of wiretapping immediately to the Federal authorities.

In a free society, the end of law enforcement does not justify any and all means. Even if far more convictions could be obtained through the use of such "dirty business" we should not choose to use them. Since the case for wiretapping and other forms of electronic eavesdropping is so weak, and irreparable injury to freedom and security so serious and certain, there is no justification for any such authority.

ESTABLISHMENT OF A DAG HAMMARSKJOLD MEMORIAL REDWOOD GROVE IN CALIFORNIA

Mr. KUCHEL. Mr. President, I ask unanimous consent that the pending business be temporarily laid aside and

[81] Ore. Rev. Stat. 141, 720 (1959).
[82] S. 1221, 87th Cong., 1st sess. (1961).
[83] *Goldstein* v. *United States*, 316 U.S. 114, 222 (1952) (dissent).

will plague and handicap many generations of Americans yet unborn. He alludes, of course, to the winner-take-all, bloc-system, of voting presently employed in our electoral college; a device designed to give some individual voters in America as much as 14 or 15 times the vote authority and individual power in a presidential election as equally intelligent and patriotic citizens living in a different State. More than any literacy test, poll tax, or complicated registration system our electoral college system is rigged to elevate the stature of an individual voter in one State and to downgrade the influence of another voter—it could be his twin brother—in another State solely because of the accident of geographic residence.

THE STATE OF DELAWARE FIGHTS BACK

Delaware, is a proud and important little State, Mr. President, and every American should applaud the action by Attorney General David P. Buckson, of Delaware, in the suit he is bringing into Federal Court to outlaw this outrageous and iniquitious electoral college counting procedure and to replace it with the one-man, one-vote concepts which the U.S. Supreme Court enunciated in the Alabama reapportionment case.

Equality of voting opportunity in the United States of America will remain an illusion and a myth until our electoral collage procedures are rectified. I propose we adopt and approve Senate Joint Resolution 12 as the optimum answer to a problem which has for too long plagued and injured America. Until we do that, any voting rights legislation we pass this session will scratch only the surface—it will continue to ignore a major source of discrimination in our voting.

I ask unanimous consent that the Wilson column appear as part of my remarks.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THE LITTLE FELLOW

(By Lyle C. Wilson)

There is one road only toward political salvation for the unaffiliated litte fellow and his folks who live in a little town or on a family-size farm far removed from the complex centers of urban civilization.

This road leads to amendment of the U.S. Constitution to give the country folk an honest count in the election of a President of the United States or it lies in judicial remedy.

The present system is rigged like a crooked carnival wheel. The system is rigged against rural and smalltown citizens and in favor of the city slickers. These city citizens are organized and affiliated by race, color, religion, and occupation.

Some press for change merely for the sake of change. One result is that political conservatism is being squeezed out of the cities. Political conservatism is becoming concentrated in little rural dikes of opposition to the massive ground swells generated by the pulsating activity of big town pressure groups.

But these are feeble dikes, as demonstrated by national elections over the past 30 years. In terms of music and physical force, the present method of electing a President simply hamstrings the country folk, the conservatives. What to do?